



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CERTIFIED MAIL
VIA FIRST CLASS MAIL

MAY 23 2006

Steve Ross
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036

RE: MUR 5642

Dear Mr. Ross:

On January 26, 2005, the Federal Election Commission notified your client, George Soros, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your client at that time.

Upon further review of the allegations contained in the complaint, and information supplied by your client, the Commission, on April 18, 2006, found that there is reason to believe your client violated 2 U.S.C. § 434(c) and 11 C.F.R. § 109.10. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in

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George Soros
MUR 5642
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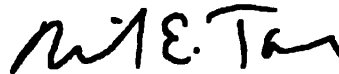
settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

If you have any questions, please contact Zachary Mahshie, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Michael E. Toner
Chairman

Enclosures
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FACTUAL AND LEGAL ANALYSIS

Respondent:

George Soros

MUR: 5642

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by National Legal and Policy Center concerning alleged violations of the reporting requirements by George Soros. *See* 2 U.S.C. § 437g(a)(1). As more fully set forth below, there is reason to believe Mr. Soros violated the Act.

II. FACTUAL & LEGAL ANALYSIS

Mr. Soros did not represent a campaign or political committee and was not a candidate during the 2004 election cycle. *See* 11 C.F.R. §§ 100.3, 100.5. There is also no allegation of coordination between Mr. Soros and a candidate, party or their agent. *See* 11 C.F.R. § 109.21. Thus, his expenditures are subject, at most, to the regulations regarding independent expenditures. *See* 11 C.F.R. §§ 100.16, 104.4(g), 109.10.

An independent expenditure is an expenditure for a communication that is not coordinated and that expressly advocates the election or defeat of a clearly identified candidate for Federal office. 2 U.S.C. § 431(17); 11 C.F.R. § 100.16. An individual may make unlimited independent expenditures but is required to report those expenditures if, in aggregate, they exceed the statutory thresholds, which vary based on the timing of the disbursement and the

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proximity to an election. *Buckley v. Valeo*, 424 U.S. 1, 45 (1976); 2 U.S.C. § 434(c); 11 C.F.R. §§ 100.16, 104.4(g), 109.10.

Under the Commission's regulations, express advocacy exists where a communication uses phrases such as "vote for the President," "re-elect your Congressman," or "Smith for Congress," or uses campaign slogans or words that in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates for Federal office, such as posters, bumper stickers, or advertisements that say, "Nixon's the One," "Carter '76," "Reagan/Bush," or "Mondale!" See 11 C.F.R. § 100.22(a); see also *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) ("*MCFL*") ("[The publication] provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than 'Vote for Smith' does not change its essential nature."). Express advocacy also exists where communications contain an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning" and about which "reasonable minds could not differ as to whether it encourages actions to elect or defeat" a candidate when taken as a whole and with limited reference to external events, such as the proximity to the election. 11 C.F.R. § 100.22(b).

A. Factual Summary

During September and October 2004, Mr. Soros mailed a brochure packet to two million potential voters. The packet clearly stated numerous times that President Bush should not be re-elected, including the headline, "Why We Must Not Re-elect President Bush." Compl. Attachment C. The packet also contained a four-page pamphlet written by Mr. Soros that detailed why he opposed the re-election of President Bush. In connection with the mailing, Mr. Soros reported independent expenditures of \$747,680.00 to EU Services, Inc., a direct mail production company, for printing, postage, and handling, \$7,932.50 to Ann Wixon for managing

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the mailing production, and \$2,500.00 to Karol Keane for brochure design. All three expenditures were reported as occurring on October 4, 2004. Mr. Soros did not report any expenditures related to the costs of renting or purchasing a mailing list.

The complaint does not provide specific information about Mr. Soros's disbursements associated with acquiring a mailing list. However, it alleges that a mailing list is a necessary element of a direct mail campaign and that, given the number of brochures mailed, the cost to Mr. Soros for the list must have exceeded the disclosure threshold.

B. Legal Analysis

While the complainant does not appear to have actual knowledge of the existence of a mailing list or its costs, Mr. Soros does not dispute that he acquired one or more mailing lists in connection with this mass mailing, nor does he assert that the cost of the list was below the disclosure threshold. Instead, Mr. Soros asserts he is not required to report mailing list rental disbursements because they are operating expenses, not communication expenses, which he claims individuals are not required to report as independent expenditures. Mr. Soros rests this assertion on Advisory Opinion 1979-80 (NCPAC).

In AO 1979-80, a multi-candidate committee, NCPAC, sought to make an independent expenditure but was concerned that renting mailing lists from a party who also rented lists to the opposing candidate would constitute impermissible "common vendor" coordination. AO 1979-80. The Commission concluded that, regardless of whether or not the list broker was an agent of the opposing candidate, the list rental was an operating expense because NCPAC was "neither making any communication by renting the list nor [was] it making an independent expenditure through the broker." *Id.* Thus, the Commission concluded the use of a common list broker would not make the broker a common vendor or constitute prohibited coordination. *Id.* Mr.

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Soros argues that the Advisory Opinion requires mailing list costs to be included as operating expenses, as opposed to being part of the communication. If the mailing list is not part of the communication, he contends, a disbursement for a mailing list cannot be an independent expenditure.

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The analysis of AO 1979-80 does not appear to control this matter, because Mr. Soros is an individual and not a committee. Cf. 2 U.S.C. § 437f(c) (reliance on an Advisory Opinion as a defense to an enforcement action is only allowed if the transactions are materially indistinguishable). In the case of an individual, it is unlikely the Commission would find that list broker expenses – or *any* expenses, for that matter – constitute operating expenses, because individuals simply do not have “operating expenses” in the sense contemplated by AO 1979-80 or by the disclosure requirements for committees in 2 U.S.C. § 434(b)(4)(A). Furthermore, the reporting impact of categorizing a disbursement as an operating cost instead of an independent expenditure is drastically different for a committee as opposed to an individual. For a committee, it merely changes *where* the disbursement must be reported. See 11 C.F.R. § 104.3. For an individual, it would change *whether* the disbursement must be reported at all.¹

Because the mailing list used to send Mr. Soros’s brochure, and the disbursements to obtain it, was an integral part of the communication – indeed, the mailing could not have been

¹ Moreover, the analysis in AO 1979-80 pertaining to political committees has been effectively superseded. The Explanation and Justification of the most recent amendments to 11 C.F.R. § 104.4(f), published in the Federal Register on January 3, 2003, indicates that both production *and distribution* costs associated with an independent expenditure made by a political committee are reportable on Schedule E as independent expenditures. See Explanation & Justification, Bipartisan Campaign Reform Act of 2002 Reporting, 68 Fed. Reg. 404, 407 (Jan. 3, 2003). Under the regulations now in force, the only time such disbursements are reportable on Schedule E as ‘operating expenses’ is when the production and distribution costs are incurred in one reporting period, and the public distribution of the independent expenditure occurs in a later reporting period. And even then, the costs must still be reported a second time, on Schedule E of the subsequent report, as part of the independent expenditure. See *id.*

produced or publicly distributed to two million potential voters without it – and because Mr. Soros does not dispute the allegation that he paid for a mailing list in connection with this direct mailing, the mailing list disbursements appear to be independent expenditures. Furthermore, because disclosure reports reveal that the cost of the mailing already exceeded the reporting threshold even without the mailing list, Mr. Soros was required to include the cost of the mailing list. See 2 U.S.C. § 434(c) and 11 C.F.R. § 109.10 (all costs for a communication are aggregated to determine if the threshold is met). Thus, the Commission finds reason to believe Mr. Soros violated 2 U.S.C. § 434(c) and 11 C.F.R. § 109.10 by failing to report disbursements associated with acquiring the mailing list.

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